

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

PHILLIP T. THOMAS,

Petitioner,

ORDER

v.

13-cv-135-wmc

UNITED STATES OF AMERICA,

Respondent.

Petitioner Phillip T. Thomas has filed a motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255. He primarily contends that his trial attorney failed to file a notice of appeal after he was “expressly instructed” to do so. On June 19, 2013, this court appointed the Federal Defender Services of Wisconsin or his designee to represent Thomas for purposes of an evidentiary hearing on this issue. (Dkt. # 7). Federal Defender Michael Lieberman, who appeared previously on Thomas’s behalf, has now filed a “motion to withdraw” as attorney of record, citing “an impasse making continued effective representation impossible.” (Dkt. # 9).

According to Lieberman, Thomas initially advised that he “no longer wished to pursue” relief under § 2255 and instructed counsel to withdraw the motion. (Dkt. # 8). After Lieberman gave notice of Thomas’ intent to withdraw his claims, Thomas changed his mind and asked to proceed with his motion and to assert additional claims. “After engaging in a discussion about these potential new issues, as well as how to proceed with the current motion,” Thomas decided that he no longer wants to be represented by an

attorney with the Federal Defenders Services. Thomas would, however, like to have another counsel appointed for him.

Unlike indigent criminal defendants, there is no automatic right to court-appointed counsel in a civil case, including cases on collateral review. *See Luttrell v. Nickel*, 129 F.3d 933, 936 (7th Cir. 1997); *see also Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (“Our cases establish that the right to appointed counsel extends to the first appeal of right, and no further.”). A court may appoint counsel for a financially eligible habeas corpus petitioner where “the interests of justice so require.” 18 U.S.C. § 3006A(g); *Johnson v. Chandler*, 487 F.3d 1037, 1038 (7th Cir. 2007). However, appointment of counsel in this context is discretionary “unless denial would result in fundamental unfairness impinging on due process rights.” *Wilson v. Duckworth*, 716 F.2d 415, 418 (7th Cir. 1983) (quoting *LaClair v. United States*, 374 F.2d 486, 489 (7th Cir. 1967)); *Winsett v. Washington*, 130 F.3d 269, 280 (7th Cir. 2007).

There are a limited number of attorneys with the background and experience necessary to take these cases in a pro bono capacity. While this is one of those rare cases where the court believed that appointment was appropriate given the need for an evidentiary hearing to address the defendant’s claim that trial counsel failed to perfect an appeal, indigent offenders are not allowed to pick and choose the attorneys which will be appointed to represent their interests. Moreover, the court appointed outstanding counsel, making it unlikely that another attorney will be any better suited to Thomas’s taste. The court will not, therefore, appoint new counsel.

ORDER

IT IS ORDERED that the motion to withdraw as counsel for Philip Thomas (dkt. # 9) is GRANTED. Thomas has twenty-one (21) days from the date of this order to advise the court whether he wishes to go forward with his current motion under 28 U.S.C. § 2255. If so, the court will set this matter for an evidentiary hearing on the claim that trial counsel failed to file a notice of appeal on Thomas's behalf. If Thomas does not wish to proceed with his current motion, the matter will be dismissed without prejudice.

Entered this 14th day of August, 2013.

BY THE COURT:

/s/

WILLIAM M. CONLEY
District Judge